

Response to the Scottish Commission’s scrutiny report on 18 November 2021 on the Suspension of Assistance (Disability Assistance for Children and Young People) (Scottish Child Payment) (Scotland) Regulations 2021

SCoSS Recommendation	Accept/ Partially Accept/ Reject	Scottish Government Response
<p>1. The Scottish Government is invited to consider how it can clarify who is meant by the ‘individual’ and ‘the person’ as they appear in social security regulations.</p>	<p>Accept</p>	<p>The Scottish Government agrees with SCoSS that what is meant by ‘the individual’ and ‘the person’ as they appear in the regulations is clear as a matter of statutory interpretation.</p> <p>The Interpretation and Legislative Reform (Scotland) Act 2010 defines the word ‘person’ as including persons corporate or incorporated and a partnership constituted under Scots law as well as including individuals. This is appropriate for use in the regulations because all legal persons, not just individuals, can act on behalf of an individual entitled to assistance. The term ‘individual’ is used throughout the Social Security (Scotland) Act 2018 (“the 2018 Act”) to describe a person applying for or in receipt of assistance. A ‘person’ is someone else who receives the assistance on behalf of the individual.</p> <p>The Scottish Government is currently preparing a set of client representative guidelines, which are designed to support any person who is acting, or thinking of acting, on behalf of an individual in connection with the individual’s entitlement to assistance. These guidelines will help the Scottish Government to clearly explain to individuals and their representatives the distinction between what is meant by ‘person’ and ‘individual’ in circumstances where Ministers consider it necessary to suspend assistance for reasons relating to an arrangement for a ‘person’ to receive assistance on behalf of an ‘individual’.</p>
<p>2. The Scottish Government should amend new SCP Regulation 19A(1) to refer to suspension of payment rather than entitlement.</p>	<p>Accept</p>	<p>Although legally it is not incorrect to refer to entitlement being suspended, we agree that the legal effect of suspension may be misconstrued by using the term ‘entitlement’ rather than ‘payment’ in this part of the regulations. The legal effect of a suspension is that the individual is not entitled to assistance but only <i>for as long as the suspension is in place</i>.</p> <p>Once a suspension ends, the individual is to immediately become entitled to</p>

		receive all the assistance that they would have been entitled to receive, under the latest determination of entitlement, during the period of the suspension.
3. Where there is a failure to provide information which is only needed to decide a possible <u>increase</u> in entitlement, the existing award should not be suspended.	Accept	The Scottish Government is preparing decision-making guidance to guide staff working in Social Security Scotland on when to suspend assistance in accordance with these regulations and in accordance with operational policy. This decision-making guidance will explain that where a request for information relates only to the possibility of a potential increase in entitlement, Social Security Scotland will not consider suspending an individual's award. The decision making guidance will apply to the administration of all forms of ongoing assistance administered under the 2018 Act.
4. The Scottish Government is invited to reconsider the minimum statutory time of 14 days for response to requests for information pertinent to ongoing eligibility, with a view to extending it to 28 days, and give reasons for retaining 14 days should that be its conclusion.	Accept	<p>The Scottish Government has reconsidered the minimum statutory periods for making:</p> <ul style="list-style-type: none"> • an initial request for information, after which payments may be suspended if the information is not provided; • a further request for providing the same information, after which entitlement may be ended if the information is not provided. <p>Unfortunately, after further reconsideration, the Scottish Government does not consider itself able to provide in secondary legislation for a minimum statutory period of time to provide information where this is requested under section 54(1) and section 54(1B) of the 2018 Act. Section 54 of the 2018 Act applies to all forms of assistance administered under regulations made under Chapter 2 of the 2018 Act. This means it applies to all forms of assistance paid under the 2018 Act with the exception of top-up assistance. The Scottish Child Payment is a form of top-up assistance and Carer's allowance supplement.</p> <p>The reason the Scottish Government cannot provide for a statutory minimum period is because the power to request information under section 54(1) and section 54(1B) is contained in primary legislation and confers full discretion on the Scottish Ministers to specify the length of the period. The Scottish Government does not consider it possible to use secondary legislation to constrain this discretion in the absence of a specific regulation making power to do this.</p>

		<p>SCoSS will of course appreciate that when Ministers request information for the purpose of reviewing ongoing entitlement to Scottish Child Payment, they are not requesting this information under section 54(1) or section 54(1B) of the Social Security (Scotland) Act 2018. They are instead requesting this information in accordance with regulations made under Chapter 3 of the 2018 Act. The regulation-making power under Chapter 3 of the 2018 Act is broad enough to provide for a statutory minimum time period. However, the Scottish Government has decided not to provide for one as this approach would be inconsistent with the statutory rules on requesting information for the purpose of Ministers reviewing entitlement to most forms of assistance under the 2018 Act.</p> <p>Instead, the Scottish Government will provide in decision-making guidance that case managers should always give clients at least 28 days to provide requested information. This 28 day rule will apply to both an initial and further request for information.</p> <p>The Scottish Government is committed to treating individuals with fairness, dignity and respect when reviewing entitlement to assistance and will carry out this function in a way which is consistent with the Social Security Charter, which commits Ministers to follow processes which support clients' wellbeing and are as stress-free as possible.</p> <p>The Scottish Government accepts that 14 days is not enough time for individuals to source information from third parties or for them to arrange to receive independent advice. The decision-making guidance will guide decision makers to only make reasonable requests for information, and to withdraw requests when they no longer appear reasonable. Decision makers will also be required to extend the 28 day period where this is reasonable in individual cases.</p>
<p>5. Scottish Government should amend SCP Regulation 19C(2) to stipulate that the individual must have a permanent record of the information</p>	<p>Accept in principle but reject need to modify drafting.</p>	<p>Notices of a decision to suspend assistance must contain the decision, the reasons for it, details about the individual's right to require Ministers to review the decision and mention any steps which might be taken by the individual in order for the suspension to be ended.</p>

<p>referred to in Regulation 19C(1) without specifying the form that must take.</p>		<p>SCP Regulation 19C(2) and CDP Regulation 26C(2) requires that notices of decisions to suspend must leave the individual with a record of the information which the individual can show to, <i>or otherwise share</i>, with others. This wording reflects the similar duty under section 40(2) of the 2018 Act to notify individuals of a determination of entitlement in the same way.</p> <p>The Scottish Government believes the current drafting does require Ministers to issue the individual with a permanent record of information without specifying the form that must take. The risk of expressing this requirement any differently to how it is currently expressed is that it could inadvertently influence how similar duties are interpreted by the courts, such as the duty under section 40(2) of the 2018 Act. For example, an inference could be drawn that Ministers do not need to provide individuals with permanent records of the determination of their entitlement to assistance.</p>
<p>6. Scottish Government should consider amending draft Regulation 3, so that a right to advocacy, similar to that conferred by section 10 of the 2018 Act, attaches to the suspension of SCP.</p>	<p>Accept</p>	<p>The Scottish Government accepts the need to reflect on whether the scope of section 10 of the 2018 is sufficient to match the Scottish Government's policy ambitions relating to the provision of advocacy to all individuals with a disability.</p> <p>Section 10 of the 2018 Act applies to all assistance paid through the Scottish Social Security System, including top-up assistance. The Scottish Government would have concerns about seeking to rely on the regulation-making power to administer top-up assistance to widen the scope of section 10 of the 2018 Act.</p>
<p>7. SCoSS invites the SG to explain what actions it is planning to identify and safeguard individuals who face difficulty engaging in the suspension progress, and to consider whether this needs to be further enhanced.</p>	<p>Accept</p>	<p>If it is considered necessary to suspend assistance because Ministers have arranged for a person to receive assistance on an individual's behalf and either:</p> <ul style="list-style-type: none"> • the current arrangement can no longer continue, • there is a risk of financial abuse, or • the arrangement for paying Child Disability Payment needs reviewed in light of the individual turning 16 years old , <p>then the suspension can only last as long as the suspension is considered necessary for any of these reasons. If assistance is suspended on grounds of necessity, decision-making guidance will guide decision makers to proactively</p>

		<p>make an alternative arrangement for the individual to receive assistance so that suspension is no longer necessary.</p> <p>If assistance is suspended because the client has not provided information requested by Ministers, then Social Security Scotland must ask again for the information to be provided within a further period. If the information is not provided within the further period, then Ministers may effectively end entitlement to assistance. However, we will look at ways to avoid suspending or ending an individual's entitlement such as:</p> <ul style="list-style-type: none"> • extending the period for providing the information if the individual reasonably requests this; • sending individuals reminder notices and trying different ways of contacting the individual before deciding to suspend assistance; • encouraging case managers to consider if the same or similar information could be obtained from a source other than the individual; • arranging for another case manager to review whether the requested information really is pertinent to reviewing entitlement before deciding to end entitlement. <p>The Scottish Government will continue to keep under review whether individuals are having difficulty engaging with Social Security Scotland, whether this engagement is for the purpose of avoiding a suspension or for the purpose of having a suspension ended.</p>
<p>8. The Scottish Government should monitor the impact of the duty to have regard to financial circumstances before suspending payment of SCP to determine whether it in fact encourages claimants to engage with Social Security Scotland and</p>	<p>Accept</p>	<p>During stage 1 of the Social Security Administration and Tribunal Membership (Scotland) Bill, Jon Shaw, welfare rights advisor for Child Poverty Action Group made the following comment on section 54 of the 2018 Act (obligation to provide information on request) as it was before this section was amended to allow Ministers to suspend in accordance with regulations:</p> <p>“The second issue to note is that, if somebody is not engaging with a review of their disability benefit entitlement, the only option available is to stop their benefit and make them claim again and to challenge the decision to stop the benefit. If their address has gone awry on Social Security Scotland’s computers, suspending their benefit and prompting them to get in touch without the need for a new claim would be a real advantage and perhaps better for claimants</p>

<p>whether it results in avoidable overpayments.</p>		<p>than having to make a new claim. Therefore, we accept that the primary legislation needs to change”</p> <p>The primary aim of suspension under this circumstance is to have a new means of prompting the individual to provide information before Ministers feel obliged to end their entitlement. Under explanation that for some individuals, any other means of prompting them that is already available to Ministers would not be effective.</p> <p>The Scottish Government’s primary policy aim under these regulations is not to avoid all potential overpayments to the very fullest extent possible. If this was the policy aim, the Scottish Government would need a broad power to suspend assistance as soon as “an issue arises whether the conditions for entitlement to a relevant benefit are or were fulfilled”. The DWP have such a broad power to suspend under regulation 16(3)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Stakeholders who have expressed a view on suspension of assistance under the 2018 Act unanimously do not support a power to suspend under this circumstance.</p> <p>When Social Security Scotland request information from individuals, the individual will be notified that the reason that their entitlement is being reviewed relates to a possible overpayment. If an individual self-assesses their financial circumstances and tells Social Security Scotland that a suspension would cause financial or other hardship, then the policy is not to suspend in this circumstance. An individual in this position will have made an informed decision and will understand both that they will be liable¹ to repay all assistance which may (or may not) have been overpaid and that entitlement may be ended if the requested information is not provided.</p> <p>The Scottish Government has sought to impact this approach to assessing hardship, versus the approach of objectively assessing hardship, in a range of scenarios, including where the individual is unwilling or unable to provide the requested information and is being overpaid.</p>
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<p>9. The Scottish Government should clarify the implications of suspension for passported entitlements (whether devolved or reserved) at the earliest opportunity. In</p>	<p>Accept</p>	<p>The Scottish Government has a complete understanding of the legal implications of suspending Disability Assistance paid under the 2018 Act on entitlement to passported forms of assistance, and has worked with the DWP and other stakeholders to impact both the legal and practical implications of suspending assistance for access to passported forms of assistance.</p>

<p>doing so, it should consider whether there are scenarios in which it should be possible to complete the qualifying period for Young Carer Grant by providing someone whose CDP has been suspended.</p>		<p>The eligibility criteria for most passported forms of assistance is based on being in receipt of a qualifying award. When assistance is suspended, an individual is no longer considered to be in receipt of the qualifying award. The effect of suspension is therefore to disentitle them to the passported form of assistance. This effect mirrors the effect of a suspension of a UK Government administered disability benefit by the DWP. This underlines the need to have a suspension policy with robust safeguards, so that assistance is only suspended in proportionate circumstances.</p> <p>We are very grateful for SCoSS' advice on issue, which makes the point that whether or not the suspension of a qualifying disability benefit should have the effect of disentitling the individual to a passported form of assistance is a policy decision, which should be taken for each individual passported form of assistance, and regard should be had to the reason for suspension when making this decision. The Scottish Government appreciates this approach and will consider adopting it when reviewing the eligibility criteria to devolved passported forms of assistance, including the Young Carer Grant.</p>
<p>10. Scottish Government should confirm at an early stage how it will resolve disputes between persons with parental responsibility regarding the suspension of social security assistance, and include this in published guidance.</p>	<p>Accept</p>	<p>The regulations do not allow for the suspension of assistance at the request of the individual. The Scottish Government does recognise the potential for disputes between two persons with parental responsibility with regard to who should receive Child Disability Payment or Scottish Child Payment, but is unsure of the potential for disputes regarding specifically the suspension of social security assistance. The Scottish Government also recognises that the dispute could involve an individual with parental rights who is a victim of domestic abuse.</p> <p>The Scottish Government will further consult with stakeholders and further consider when and how it should involve itself in such disputes, and will publish guidance once this work has concluded.</p>
<p>11. The Scottish Government should further amend SCP Regulation 19B to include a</p>	<p>Partially accept.</p>	<p>Under the draft regulations which were shared with SCoSS for scrutiny, individuals have a right to be notified about a decision to suspend assistance, and have the right to require Ministers to review a decision to suspend assistance, but the provision did not expressly provide that an individual has the</p>

<p>requirement that the outcome of a review and the next steps if the person is dissatisfied with the outcome are communicated to the person requesting review.</p>		<p>right to be notified about the outcome of the review and the reasons for the outcome. The Scottish Government has amended the draft regulations to address this gap in the provision.</p> <p>The Scottish Government rejects the 2nd part of this recommendation which is to require Ministers in regulations to notify individuals of any next steps that they may take if they are dissatisfied with the outcome of the review. Such a requirement may be difficult to comply with in practice. If an individual is dissatisfied with the outcome of the review, there is no statutory right to appeal the outcome of the review. Possible next steps for the individual are therefore to require Ministers to review the suspension decision again or to raise judicial review proceedings. We do not think it would be appropriate for Ministers to advise the individual of these possible next steps, neither of which may be suitable under the circumstances.</p> <p>The decision-making guidance will however account for the situation where Ministers decide to uphold a decision to suspend assistance following a review of that decision. In this circumstance, decision-making guidance will require decision-makers in Social Security Scotland to sign-post the individual to services where the individual may be able to get free and independent advice. Decision makers will also be required, where this would be helpful for the individual, to notify the individual again about the information that the individual was required to be notified of at the time of the initial suspension. This information includes any steps which might be taken by the individual in order for the Scottish Ministers to consider ending the suspension.</p>
<p>12. The SCoSS invites the SG to explain the rationale for the proposed 31-day period for consideration of a request for review of a decision to suspend payment, in particular why this is longer than the 16 working days normally</p>	<p>Accept</p>	<p>The Scottish Child Payment Regulations 2020 places a duty on the Scottish Ministers to ‘aim’ to make a re-determination of entitlement within 16 working days of receiving a re-determination request. A working day means a day other than a Saturday, Sunday or a bank holiday. 16 working days is no less than 22 days. The Scottish Government considers a longer statutory period of time is justified than 16 working days because the grounds for suspending assistance will not always be straightforward to review. Where the reason for suspension is because it is considered necessary following an arrangement being made for a person to receive assistance on behalf of the individual, the grounds for</p>

<p>allowed for redetermination of entitlement to social security assistance</p>		<p>imposing the suspension will relate to the necessity of suspension because either:</p> <ul style="list-style-type: none"> • the current arrangement can no longer continue, • there is a risk of financial abuse • the arrangement for paying Child Disability Payment needs reviewed in light of in the individual turning 16 years old. <p>Reviewing the necessity of suspension is expected to require Ministers to make enquiries with third parties in most cases. Unlike in the case of re-determining determinations of entitlement, the individual's circumstances are more likely to have materially changed during the period when the decision was first taken and when the review is being carried out.</p>
<p>SCoSS Observation</p>		<p>Scottish Government Response</p>
<p>1. The making of substantively similar amendments to the SCP and DACYP Regulations is one of a number of scenarios in which section 97(1) of the 2018 Act creates what can appear to be an illogical divide between the parts of a set of draft Regulations that fall within and outside SCoSS's pre-legislative scrutiny function. There may be something to consider when primary social security legislation is next considered.</p>		<p>The Scottish Government welcomes this observation and will consider further.</p>
<p>2. SCoSS notes the particular importance of inclusive communication,</p>		<p>The Scottish Government welcomes this observation, and understands that the requirement to notify individuals of the information contained in SCP Regulation</p>

<p>advocacy and supported decision making in ensuring people are able to respond to a request for information material to their entitlement and understand why their award may be suspended, or has been suspended, the steps required to avoid or end the suspension, their right to review a decision to suspend and the protection available in cases of financial hardship (including the implications of invoking this protection).</p>		<p>19C is an important safeguard which would be undermined in any case where that information is not accessible to the individual.</p>
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Section 97(10) of the 2018 Act also requires Ministers to give details of how (if at all) the regulations differ from the proposals which were shared with SCoSS pursuant to the requirement under section 97(2)(a). The regulations differ insofar as they do not propose to confer on individuals a right to request that their payments of Child Disability Payment or Scottish Child Payment are suspended. Ministers have decided not to provide for this right at this stage because we are not convinced that doing so is the most effective means of achieving the policy aim behind suspension under this circumstance. This policy aim was to provide victims of domestic abuse with a means of preventing an abuser from accessing the assistance that they are entitled to.